STATE OF MICHIGAN

COURT OF APPEALS

DANNY CARL DOERSCHER,

Plaintiff-Appellant,

v

JAMES C. GARRETT, d/b/a BULLDOG SECURITY,

Defendant-Appellee.

UNPUBLISHED
October 13, 2005

No. 255808
Roscommon Circuit Court
LC No. 04-724433-NO

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(8).[1] This case arises out of a snowmobile collision in which plaintiff was severely injured and two other individuals were killed.

For the purposes of this appeal, the following alleged facts are accepted as true. On the evening of January 27, 2001, plaintiff was a passenger on a snowmobile being driven by Anthony Block on the ice covering Houghton Lake. Dawn Whitlock was also operating a snowmobile on the ice, headed in the opposite direction. Near Oakridge Drive, the two snowmobiles collided, killing Whitlock and Block. Plaintiff was severely and permanently injured. Before the fatal accident, Whitlock had been served alcohol in the Tip-up Town U.S.A. "beverage tent" (also referred to in the record as a "beer tent") operated by the Houghton Lake

[1] Plaintiff's inclusion in its brief on appeal of certain "facts" not included in the allegations of its complaint and inclusion and reference to defendant's deposition is improper given that under a (C)(8) motion only the pleadings are to be considered. See *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Similarly, defendant's reference to the security contract was not permissible. See MCR 2.116(G)(5)("Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)."); *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997)(stating that motions for summary disposition under (C)(8) "are examined on the pleadings alone, absent consideration of supporting affidavits, depositions, admissions, or other documentary evidence . . . .").

Chamber of Commerce. According to plaintiff, Whitlock was visibly intoxicated as a result of her consumption of alcohol in the tent.

On November 21, 2000, defendant had contracted with the Houghton Lake Chamber of Commerce to provide security services for the beverage tent. Defendant agreed to provide an eleven-man staff to prevent, in pertinent part, intoxication in the beverage tent.

Plaintiff filed a two-count complaint. In the first count of his complaint, alleging breach of contract, plaintiff claimed that he was a foreseeably intended third-party beneficiary of the security contract between defendant and the chamber of commerce. See MCL 600.1405 (statutory provision addressing rights of third party beneficiaries). According to plaintiff, defendant breached his contractual duty to prevent intoxication by allowing Whitlock to become intoxicated in the beverage tent, and Whitlock's intoxication was a proximate cause of plaintiff's injuries. Plaintiff further alleged that defendant breached his contractual duty to plaintiff by failing to maintain an eleven-man staff. In his second count, plaintiff alleged that defendant negligently breached his duty to prevent Whitlock's intoxication, which resulted in her negligent operation of a snowmobile and was a proximate cause of plaintiff's injuries.

After hearing oral arguments on defendant's motion for summary disposition, the trial court concluded that there was no way defendant's duties could be extended to an accident that occurred at a site and time removed from the beverage tent. Accordingly, the court ruled that defendant was entitled to summary disposition under MCR 2.116(C)(8).

Plaintiff first argues on appeal that the trial court erred in granting summary disposition to defendant because defendant breached his duty to prevent intoxication, and in doing so, he breached the contract in a way that directly affected plaintiff as a member of the class of individuals contemplated by the contract because the crash was the anticipatable and foreseeable consequence of allowing a drunken snowmobile operator to leave the tent. We disagree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. Under this motion, the legal basis of the complaint is tested by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). All well-pleaded factual allegations are taken as true and construed in a light most favorable to the nonmoving party. *Id*. at 119. The motion may be granted where the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover. *Id*.

MCL 600.1405, pertaining to third-party beneficiaries, states in pertinent part as follows:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Under MCL 600.1405, a promise may be undertaken for a sufficiently described or designated class of persons, rather than only a person specifically named in the contract. *Brunsell v Zeeland*, 467 Mich 293, 296-297; 651 NW2d 388 (2002); *Koenig v South Haven*, 460 Mich 667, 676-677, 680; 597 NW2d 99 (1999)(Taylor, J.); see MCL 600.1405(2)(b). However, the statute "'does not empower just any person who benefits from a contract to enforce it. [2] Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation 'directly' to or for the person.'" *Brunsell*, *supra* at 296-297, quoting *Koenig*, *supra* at 677 (Taylor, J.)(alteration added). It was the Legislature's intent to provide a level of certainty to contracting parties regarding the scope of their contracts. *Brunsell*, *supra* at 297. Therefore, while an individual need not be referred to specifically by name in a contract, it is necessary to limit interpretation of subsection (2)(b) to a designated class of persons or else it would completely negate use of the term "directly" in subsection (1). *Id.* The class needs to be something less than the entire universe. *Id.* An objective standard is used to ascertain from the contract itself whether a promisor undertook an obligation directly for the plaintiff. *Id.*

Applying the principles later adopted in *Brunsell*, in *Koenig*, Justice Taylor in his lead opinion considered whether the plaintiffs' daughter, who was swept off a pier by a large wave during inclement weather, was a third-party beneficiary of a memorandum of understanding between the city of South Haven and the Army Corps of Engineers. *Koenig*, *supra* at 669-670. According to the plaintiffs, South Haven undertook the obligation to prevent access to the pier during dangerous conditions for the benefit of the public, a class of which the plaintiffs' daughter was a member. *Id*. at 672. Justice Taylor agreed that the concern of the memorandum was to regulate access to the piers in the interest of public safety, noting that the memorandum specifically referred to "the public." *Id*. at 681. However, Justice Taylor concluded that this general reference to the public did not sufficiently describe or designate a class of persons to include the plaintiffs' daughter. *Id*. at 682-683. "This is simply too broad a term to constitute a class that as contracting party could undertake *directly* to benefit under subsection 1405(1)." *Id*. at 683 (emphasis in original). Accordingly, Justice Taylor held that the plaintiffs failed to establish their breach of contract claim. *Id*. at 684. Noting the *Koenig* facts, the *Brunsell* Court similarly held that the contractual provision at issue reflected "that the parties were defining their obligations to each other with regard to maintenance concerns, not acting for the purpose of directly benefiting third parties." *Brunsell*, *supra* at 298-299 n 3.

In contrast, in *Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 676-677; 66 NW2d 227 (1954), the Court concluded that the plaintiff-tenant was a member of a sufficiently described or designated class where a remodeling contractor undertook the obligation to minimize the disturbance to "the daytime operations in the building." As a tenant who carried on daytime operations in the building, the Court concluded that the plaintiff was within the class of direct beneficiaries of the contract. *Id*. at 677.

It is undisputed that under the terms of the security contract defendant had a duty to prevent intoxication in the beverage tent. And it cannot reasonably be disputed that this obligation was at least in part intended to provide a safe environment for Tip-up Town

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[2] Such a person would merely be an incidental beneficiary. *Brunsell*, *supra* at 296.

participants. However, it cannot be reasonably concluded that in not preventing Whitlock, a patron of the beverage tent, from becoming intoxicated, defendant breached an obligation undertaken directly to or for plaintiff. First, there was no allegation that plaintiff was specifically named in the contract. And second, there was no allegation that plaintiff was within a class of persons sufficiently described or designated in the contract.

As stated in plaintiff's complaint, defendant merely "contracted with Houghton Lake Chamber of Commerce of Houghton Lake to provide personnel and services to the Tip-up Town U.S.A. beverage tent to prevent intoxication in the beverage tent." Therefore, if any class of persons was designated in the contract it was those persons in the beverage tent, and it was never alleged that plaintiff was in the beverage tent. Therefore, the trial court properly concluded that there was no way defendant's duties could be extended to an accident that occurred at a site and time removed from the beverage tent. Plaintiff failed to state a claim on which relief could be granted by failing to properly allege that plaintiff was a third-party beneficiary of the security contract. Plaintiff was *at most* an incidental beneficiary with no rights under the contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 429; 670 NW2d 651 (2003); *Brunsell*, *supra* at 297. And no factual development could possibly justify recovery. *Maiden*, *supra* at 119.

Plaintiff also argues, with respect to his negligence claim, that defendant undertook the duty of preventing intoxication, and the benefit of this duty clearly ran to both the chamber of commerce and plaintiff because the failure to perform his duty could be foreseeably expected to cause harm to both parties. We disagree. Whether a defendant owed a duty to a plaintiff is a question of law that this Court reviews de novo. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004).

In *Fultz*, *supra* at 462-463, our Supreme Court specifically addressed whether a plaintiff could establish a duty owed arising from a contract to which the plaintiff was not a party.

> [T]he lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id*. at 467.]

Here, defendant's alleged duty – to prevent intoxication – is framed by the language of plaintiff's complaint in a manner that directly mimics or relates to the language contained in the contract; it is not clearly defined as a separate and distinct duty and thus the complaint fails under *Fultz*. Moreover, assuming that plaintiff was attempting to reference a legal, common-law duty in the complaint independent of any duty arising under the contract, we find as a matter of law that no duty to plaintiff arose in this case under the facts alleged in the complaint other than the duty created by the contract. Therefore, plaintiff failed to satisfy the threshold requirement of alleging facts establishing that defendant owed a duty to him for purposes of a negligence cause of action.

In conclusion, the trial court properly granted summary disposition to defendant under MCR 2.116(C)(8) because plaintiff failed to state a claim on which relief could be granted where he failed to allege facts sufficient to establish that he was a third-party beneficiary under his

contract claim, and where he failed to establish a tort claim by failing to allege facts sufficient to give rise to a duty.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy